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NO. 83-5153

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

ALVIN HILL

Petitioner,

vs.

STATE OF MISSISSIPPI

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

Should certiorari be granted to determine who bears the burden of proof on the question of independent source for physical evidence that is a presumptive fruit of an illegally obtained confession and by what standard?

II.

Should certiorari be granted to determine whether the totality of the jury instructions given at the sentencing phase violated the Eighth and Fourteenth Amendments and whether a reasonable juror could have understood the instructions to mandate death based on relative weight of the aggravating circumstances and to preclude consideration of mercy regardless of the existence of mitigating factors?

III.

Should certiorari be granted to determine whether or not the admission into evidence of seven (7) black and white photographs depicting the victim's skeletal remains violated the Sixth, Eighth, and Fourteenth Amendments?

TABLE OF CONTENTS

I. PREFACE---------- 1

II. OPINION BELOW---------- 1

III. JURISDICTION---------- 2

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED------ 1

V. STATEMENT OF THE CASE---------- 2

VI. REASONS FOR DENYING THE WRIT---------- 5

I. CERTIORARI SHOULD BE DENIED BECAUSE THE FIRST QUESTION POSED BY PETITIONER IS SIMPLY NOT RIPE FOR PLENARY REVIEW. 5

II. CERTIORARI SHOULD BE DENIED BECAUSE [1] HILL FAILED ON DIRECT APPEAL TO FRAME IN FEDERAL CONSTITUTIONAL TERMS HIS STATE COURT CHALLENGE TO THE SENTENCING PHASE INSTRUCTIONS; [2] THE SUPREME COURT OF MISSISSIPPI GAVE FULL CONSIDERATION TO THE MATTERS SPECIFICALLY RAISED AND DECIDED THEM CORRECTLY; [3] THE QUESTION PRESENTED BY PETITIONER IS INCONSEQUENTIAL AND LACKS NATIONAL IMPORTANCE. 11

III. CERTIORARI SHOULD BE DENIED BECAUSE [1] PETITIONER FAILED ON DIRECT APPEAL TO COUCH HIS CLAIM IN FEDERAL CONSTITUTIONAL TERMS; [2] THE ONLY REAL QUESTION RAISED BY HILL WITH RESPECT TO THE ADMISSIBILITY OF PHOTOGRAPHS TURNS ON THE PARTICULAR FACTS OF HIS CASE ALONE AND FAILS TO IMPACT OUTSIDE THE LIMITS OF THE INSTANT PROCEEDINGS; AND [3] THE OPINION OF THE STATE COURT IS BOTH ACCURATE AND CORRECT. 15

VII. CONCLUSION----------20

VIII. CERTIFICATE OF SERVICE----------20

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RESPONDENT'S BRIEF IN OPPOSITION

I. PREFACE

Petitioner, Alvin Hill, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi rendered on May 4, 1983, affirming his conviction of capital murder and the sentence of death imposed in its wake.

II. OPINION BELOW

The opinion of the Supreme Court of Mississippi has been reported and is found at 432 So.2d 427 (Miss. 1983),reh denied May 25, 1983.

III. JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari drawn and presented under the authority granted in 28 U.S.C. § 1257(3). Respondent does not take issue with petitioner's jurisdictional statement.

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner has adequately identified and set forth the constitutional and statutory provisions involved in this cause.

V. STATEMENT OF THE CASE

Petitioner, a black male, was indicted jointly with Laverne Milan and Gregory Tucker for the July 12th, 1979, robbery and murder of Robert Watkins, a black male truck driver employed by the American Freight Lines Trucking Company in Memphis, Tennessee. The skeletal remains of Watkins were found on August 17, 1978. Hill's case was severed, and petitioner was brought to trial on November 17, 1980.

At the conclusion of the guilt-finding phase of the two-stage trial, the jury returned a verdict of, "We the jury find the defendant guilty of Capital Murder."

The second or sentence-determining phase was then conducted before the same jury. The verdict of death returned at the conclusion thereof reads as follows:

> "We, the Jury, unanimously find that the aggravating circumstance[s] of:
>
> 1. The capital offense was committed while the Defendant was engaged in the Commission of robbery [;]
>
> 2. The capital offense was committed for pecuniary gain [;]
>
> 3. The Defendant was previously convicted of a felony involving the use or threat of violence to the person [;]
>
> 4. The capital offense was especially heinous, atrocious or cruel [;] outweigh the mitigating circumstances and are sufficient to impose the death penalty, and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances and we unanimously find the Defendant should suffer death."

Appellant filed a timely motion for new trial (Vol. VIII: R. 1225),and an evidentiary hearing was conducted on January 6, 1980. (Vol. VIII:R. 1232-1293) The motion was denied, and appellant was remanded to the custody of the proper authorities to await an execution date of January 13, 1981.

Appellant gave a statement on August 18, 1979, at the Tunica County Jail in the presence of DeSoto County Sheriff Sowell,

Tunica County Sheriff Monteith, and DeSoto County investigator Ward. The interview was recorded on tape, and the transcription thereof reflects that Hill told the authorities that shortly after the homicide on the day thereof he threw the murder weapon into the Coldwater river. This confession by Hill was found to be the product of unlawful inducements and was not admitted at trial.[1/]

Prior to trial on the merits but after the suppression of the confession, appellant filed a motion to suppress as the "fruit of the poisonous tree" numerous items of evidence. "[A] gun" was one of these items. (Vol. II:R. 325) No preliminary inquiry with respect to this matter was conducted prior to the State's case-in-chief; rather, a hearing was conducted in chambers at a later time. (Vol. VI:R. 909-933)

FBI Agent Shanks testified prior to this pistol suppression hearing that he had interviewed Hill at the DeSoto County Jail on July 25, 1979. The name Bobby Hampton, Hill's confederate in the Tunica County "meat truck" caper, had been mentioned during this interview. Shanks had interviewed Hampton, and as a result thereof Hill had become a suspect. (Vol. V:R. 793) When Shanks, during the July 25th interview, confronted Hill with information Hampton had given the agent, Hill said ". . . that Sammy will get his." (Vol. V:R. 763) Hill denied making this statement to Shanks (Vol. V:R. 780) which was found to be voluntary and admissible at trial. (Vol. V:R. 784)

In open court Tunica County Sheriff Monteith testified that he had also interviewed Hampton and that as a result of this interview he had informed Sergeant Priddy of the Memphis Police Department ". . . where a possible gun could be found. (Vol. V:R. 818)

1/ Petitioner states in note 8 of his petition at p. 17 ". . . that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will. . ." Hill's confession was not a product of violence or physical coercion. It was found to have been involuntarily given because Ward had earlier suggested to petitioner he might give him a break and had told Hill that his

Monteith did not know whether a weapon had, in fact, been recovered in the wake of his revelation to the Tennessee authorities.

During the pistol suppression hearing that later followed, Bobby Rust of the Memphis Police Department testified that on August 20, 1979, he and three other members of the Memphis Police Department (Sergeants Priddy, Gilless, and Anderson) received a weapon from Robert Carter, a Memphis resident. Rust, Priddy, and Anderson all testified at the suppression hearing that the source of their information with respect to the location of the pistol was Sheriff Monteith. Monteith had not informed the officers of his own source. An interview with Carter by the Memphis authorities disclosed that Carter had loaned the .357 Magnum pistol to Hill. Carter later testified to this effect at trial. Sergeant Priddy testified during the suppression hearing that he had arrested Hampton one morning prior to the recovery of the pistol. (Vol. VI:R. 921)

DeSoto County Investigator Ward testified at the suppression hearing that he was contacted by the Memphis authorities and informed that they had custody of the murder weapon. (Vol. VI: R. 925) He went to Memphis and retrieved it. Ward had never interviewed Hampton.

The defendant testified at the suppression hearing that on the day he gave his inadmissible confession he had initially told Ward that the gun had been thrown into the Coldwater River. Ward allegedly could not find it at this location, and later that day Hill purportedly told Ward that Carter had the gun. (Vol. VI: R. 931) At the time Hill made this revelation to Investigator Ward, Sheriff Monteith was not present. Hill denied that he had ever told Sammy Hampton about the gun used in the Watkins homicide.

At the close of this testimony, the lower court ruled as follows:

> THE COURT: The testimony before the Court from Sheriff Monteith given at approximately 4:00 P.M.

> on November 18th, this being November 19, and the Court quotes from its notes made in the testimony of Sheriff Monteith that he informed Officer Priddy of the Memphis P.D. where gun could be found after an interview with a person by the name of Hampton, and that he did not know the results of information passed on to the Memphis police officer. During this motion in Chambers, Defendant Hill was called upon to testify for the limited purposes of rebutting testimony of Sheriff Monteith and other officers who had testified primarily as to the recovery of this weapon from a Robert Carter in Memphis, Tennessee, and to the links in the chain establishing custody and control of the weapon since its recovery. The Court understood, and it is now a matter of record, from Defendant Hill that he gave information to Officer Ward about the whereabouts of this weapon out of the presence of Sheriff Monteith, which makes it apparent to the Court that the information passed on to Officer Priddy by Sheriff Monteith was developed by him from some source other than the Defendant, it being contended by Defendant that this information possibly was derived by the Sheriff from the Defendant after and subsequent to the confession which the Court has heretofore suppressed. The Court, therefore, is compelled to overrule the motion now before it in Chambers to suppress the introduction of this firearm because it was derived by statements of the Defendant subsequent to the suppressed confession. Gentlemen, I think the record is abundantly clear on that point, and I think all of you will have to agree that that's what is in the record.
>
> Vol. VI:R. 933-35.

VI. REASONS FOR DENYING THE WRIT

I.

CERTIORARI SHOULD BE DENIED BECAUSE THE FIRST QUESTION POSED BY PETITIONER IS SIMPLY NOT RIPE FOR PLENARY REVIEW.

Petitioner invites this Court to determine ". . . the standard by which the state must prove independent source when the primary source for the evidence admitted [e.g., a .357 Magnum pistol used by Hill as the murder weapon] is an illegally obtained confession." (Hill's petition at p. 12) Any determination of the proper standard to be applied in a Fifth Amendment context, however, is premature for decision by this Court; the Court, in our view, should await further developments in this proceeding

from the lower state and federal courts. This is because the application of any standard turns entirely upon the unique and singular facts of Hill's case which, at best, are in equipose with respect to the source of Sheriff Monteith's information concerning the location of the gun.

The trial judge found as a fact that Monteith did not obtain this information directly from Hill. Apparently petitioner does not take issue with this factual determination made by the lower court. (See Hill's petition at pp. 13-14, note 6) From the record facts, it is clear that Monteith either got his information from Hampton, Hill's confederate and former accomplice in the Tunica County meat truck caper, or from Investigator Ward who had previously interviewed Hill outside of Monteith's presence. The Supreme Court of Mississippi focused upon the dilemma confronting the beleaguered trial judge when it penned the following:

> Hill testified he gave Ward information about the gun. This is uncontradicted.
>
> On the other hand, if Hampton also gave Tunica County Sheriff Monteith information about the gun, this could very well be an independent source, and certainly "sufficiently distinguishable" from the information from Hill "to be purged of the primary taint".
>
> Regrettably, for all concerned—including this Court—the record is incomplete.
>
> Let us to go Wednesday afternoon, November 19, 1980, in the chambers of the circuit judge. The previous day he has heard Sheriff Monteith testify, and from that testimony (although perhaps not as clearly stated as it might have been), coupled with what the Memphis police officers testified, one could only conclude that Hampton told Sheriff Monteith about the Carter gun. Indeed, there seemed to be no question about it.
>
> The circuit judge is then suddenly confronted with a startling second possibility. Hill had just testified that he told Ward that Carter had the gun.
>
> At this intriguing, tantalizing moment, the well of information runs dry. While either Ward, Monteith, or Hampton—certainly two out of these three—could have cleared the air and removed all doubt in a few moments of testimony, none was called. Why?

> The defense cogently argues that their hypothesis for the information concerning the location of the gun was correct. But, with the record before us, that is all it is. While we agree that the state arguably should have offered some rebuttal to Hill's testimony in chambers, it chose not to do so, and rested on the testimony of Sheriff Monteith the previous day.
>
> Conduct of defense counsel is puzzling. They did not recall Ward or Sheriff Monteith for further cross-examination. This failure might be understandable in the middle of this difficult and enormously burdensome trial. But, let us move further in the proceedings. Following trial, defense counsel made a motion for a new trial, and one of their strongest arguments was the admission of the gun into evidence. With ample time to prepare for the hearing on this motion, they did not subpoena Ward, Sheriff Monteith, or Hampton to testify, and no affidavit of any of these three was supplied the court.
>
> On the testimony which was before the circuit judge and the record as made, no one could ever know which of these two hypotheses is correct. Argument from now until doomsday could never give the answer; from this record we are damned to an eternal suspense.

Petitioner's Appendix A at pp. 14-16 [emphasis added].

The opinion of the Supreme Court of Mississippi succinctly recognized in note 5 ". . . that with all the post-conviction proceedings available to an accused in both our state and federal courts, this opinion may not be the last word on the above assignment of error." (Petitioner's Appendix A at p. 16) Thus, our Court clearly suggested that petitioner has other remedies available to him. In this posture, we respectfully submit that review of the inquiry by this Court should await another horizon in order to avoid premature and piecemeal review of a constitutional question.

Litigants are precluded from invoking the power of this Court to obtain constitutional rulings in advance of necessity. There exists a rigorous insistence on "exigent adversity" before this Court will grant review of constitutional questions. We do not have such here.

This petitioner is not going to die in Mississippi's gas chamber tomorrow. He, beyond all shadow of a doubt, will soon initiate his post-conviction odyssey through the state and federal

courts. It may well be that further fact-finding is necessary in order to make more clear that which petitioner contends is unclear.[2/]

Assuming this case raises an important federal question — we respectfully submit it does not — it is not a viable candidate for a grant of certiorari because the record, at best, is cloudy. It would, therefore, be desirable to have different aspects of this issue further illumined by the lower courts. As Mr. Justice Frankfurter has said: "Wise adjudication has its own time for ripening." Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 918 (1950) (opinion dissenting from denial of certiorari).

[2] Opinion Below Accurate and Correct and Right Result Reached From Record Facts.

It does not help petitioner to observe in his opening statement that this issue has never been determined by this Court. Indeed, there is no reason why it should be. The mere fact that a given question has not been resolved by the Supreme Court has never been a recognized basis for the grant of certiorari.

Petitioner does not point to any conflicts within the federal circuits that would encourage the granting of certiorari for the purpose of deciding once and for all the proper standard to be applied. He does recognize that this Court, in Lego v. Twomey, 404 U.S. 477 (1972), held that the voluntariness of a confession is to be established by a preponderance of the evidence standard. It would seem that the Fifth Amendment standard,if any,by which the government must show an independent source for physical evidence that is "fruit of the poisonous tree" should be no greater than the standard applicable to the question of voluntariness itself.

2/ Petitioner's suggestion that Hampton, the former accomplice, was in the process of being arrested at his home in Memphis at the time he was interviewed by Monteith is simply that — a suggestion only. We find no crisp record facts supporting Hill's position. Additional fact-finding in a post-conviction environment is available to shed some light on this question.

Indeed, the Court of Appeals for the 5th Circuit follows a preponderance standard in assessing the sufficiency of the government's proof to show either an independent source or that the physical evidence has become so attentuated as to dissipate the taint. The Supreme Court of Mississippi relied on those cases in resolving Hill's complain. We quote:

> The Court of Appeals for the 5th Circuit has held that once a defendant makes a showing of unconstitutional conduct by the government in securing its evidence, the burden shifts to the government to demonstrate by a preponderance of the evidence that one of the above two noted exceptions applies. See United States v. Tweel, 550 F.2d 297 (5th Cir. 1977); United States v. De La Fuente, 548 F.2d 528 (5th Cir. 1977); and United States v. Houltin, 525 F.2d 943 (5th Cir. 1976).

Petitioner's Appendix A at p. 14.

We think the Supreme Court of Mississippi implicitly, if not directly, found that the prosecutor had established an independent source by a preponderance of the evidence. It opined that

> [u]nder these circumstances we are not about to fault a beleaguered trial judge, nor can we say he abused his discretion in finding that the information about the gun came from an independent source. On the record before him at trial, and in the motion for a new trial, he had a right to believe the testimony of the officers, and we find no reversible error on this record in his having done so.

Petitioner's Appendix A at p. 16 [text of note 5 omitted].

Sheriff Monteith succinctly testified that as a result of his interview with Hampton he had informed Sergeant Priddy of the Memphis Police Department ". . . where a possible gun could be found." Priddy, in turn, testified that the source of his information with respect to the location of the pistol was Sheriff Monteith. Although Hill later testified in chambers that he gave Investigator Ward, and not Hampton, information about the gun, there is no positive testimony reflecting that Monteith got his information from Ward or from any source other than Hampton. The trial judge found as a fact that Monteith

did not obtain his information from Hill and concluded from the facts that such had an independent source. Underlying facts found by the state court are presumed to be correct unless shown otherwise. Sumner v. Mata, 449 U.S. 539 (1982). Since Hill's hypothesis as to the source of Monteith's information is speculative and constitutes nothing more than a possibility, the State met the preponderance standard.

[3] Facts Unique and Singular and Not Likely To Recur.

Finally, the facts in petitioner's case are unique and singular and not likely to recur. This observation, we think, militates against discretionary review. Petitioner has failed to demonstrate why this issue is so important that it warrants a grant of certiorari. In Nardone v. United States, 308 U.S. 338, 341 (1939), this Court said:

> The burden is, of course, on the accused in the first instance to prove to the trial court's satisfaction that the wire-tapping was unlawfully employed. Once that is established—as was plainly done here—the trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin.

308 U.S. at p. 341 [emphasis ours].

Although Nardone and its progeny, Wong Sun v. United States, 371 U.S. 471 (1963), plainly indicated that the government shouldered the burden of proving an independent source, neither decision attempted to articulate a standard by which to test the sufficiency of evidence used by the government to convince the trial court that its proof had an independent origin. Hill suggests no viable reason — other than relying upon the unique features of his case — why this Court should undertake to delineate that standard now.

II.

CERTIORARI SHOULD BE DENIED BECAUSE [1] HILL FAILED ON DIRECT APPEAL TO FRAME IN FEDERAL CONSTITUTIONAL TERMS HIS STATE COURT CHALLENGE TO THE SENTENCING PHASE INSTRUCTIONS; [2] THE SUPREME COURT OF MISSISSIPPI GAVE FULL CONSIDERATION TO THE MATTERS SPECIFICALLY RAISED AND DECIDED THEM CORRECTLY: [3] THE QUESTION PRESENTED BY PETITIONER IS INCONSEQUENTIAL AND LACKS NATIONAL IMPORTANCE.

Petitioner seeks certiorari to determine whether or not the totality of the sentencing phase instructions violates his Eighth and/or Fourteenth Amendment Rights. Specifically, Hill contends that State Instruction 3-A, coupled with the denial of D-2 (Hill's petition at p. 19) and D-8 (Hill's petition at p. 20, note 10), ". . . could have led a reasonable juror to believe that he or she could not vote for a life sentence unless the mitigating factors outweighed the aggravating factors." (Hill's petition at pp. 18-19)

[1] Jurisdictional Defects.

In stating his constitutional claim, Hill relies, in part, on Sandstrom v. Montana, 442 U.S. 510 (1979). Sandstrom involved a Fourteenth Amendment due process challenge to a single instruction delivered by the State. The focal point of petitioner's present complaint is the integrity of S-3 as analyzed in connection with the denial of D-2. But such a challenge was never nailed down in the state courts; rather, the argument on direct appeal was addressed solely to the denial of a defense instruction (D-2) and not to the correctness of a state instruction (3-A). Specifically, Hill's assignment of error reads as follows: "That the trial court erred in refusing the requested instructions which the Appellant submitted during the sentencing phase of the trial."

An Eighth and/or Fourteenth Amendment challenge to the "totality" of the sentencing phase instructions was not presented on direct appeal. Consequently, the Supreme Court of Mississippi

has not been given an opportunity to review the instructions in this context. See Sandstrom v. Montana, supra, Henderson v. Kibbe, 431 U.S. 145 (1977); Cupp v. Naughten, 414 U.S. 141 (1973). Rather, the only issues addressed on direct appeal involved the refusal below of sentencing phase instructions D-2, D-5, and D-1. The Mississippi Supreme Court, as Hill specifically invited that Court to do, individually addressed the denial of D-2, D-5, and D-1 and did not attempt to resolve any Eighth and/or Fourteenth Amendment questions in the wake of a totality analysis.

Obviously then, a totality inquiry involving instruction S-3A and D-8 cannot be entertained on certiorari because this Court lacks jurisdiction to decide an issue that has never been presented to the state courts or was not couched in a federal constitutional context in the state courts. Webb v. Webb, 451 U.S. 493 (1981), and Cardinale v. Louisiana, 394 U.S. 437 (1969).

We observe that Hill does not assail in any way the treatment by the state reviewing court of the denial of D-1 and D-5. The only proposed defense instruction that could possibly be a candidate for review on certiorari is D-2 which petitioner contends ". . . would have made clear that the jury retained discretion to opt for mercy." (Hill's Petition at p. 19)

With respect to the D-2 charge, the entire content of Hill's appellate argument penned on direct appeal is quoted as follows:

> (b) Instruction D-2 (A. 10) (R. 413) was refused by the trial judge and such refusal had the affect of denying the jury the right to sentence the Appellant as it saw fit in view of their feelings of mercy. If the jury did not find any aggravating circumstances then surely the fact that no mitigating circumstances exist does not mean the jury cannot sentence the Appellant to life imprisonment. [EMPHASIS BY RESPONDENT] If the jury is bound to follow the instructions of the Court, then certainly the Defendant is entitled to an instruction to inform the jury that mercy can be considered. This instruction attempted to do just that.
>
> In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2936, 43 L.Ed.2d 859 (1976) it was stated that:
>
> "The jury is not required to find any mitigating circumstance in order to make

> a recommendation of mercy that is binding on the trial court. . .but it must find a statutory aggravating circumstance before recommending a sentence of death." 197, 96 S.Ct. at 2936 (emphasis added)
>
> The Appellant submits that the foregoing language authorizes the requested instruction. Such refusal of the instruction likewise necessitates reversal. (See Jackson v. State, 337 So.2d 1242 (Miss. 1976).

The gist of petitioner's present lamentations is that "[i]n giving [instruction S. 3-A] but refusing [D-2], the Court deprived petitioner of his rights under the eighth and fourteenth amendments because it created 'the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.' Lockett v. Ohio, 438 U.S. 586, 605 (1978)." Such is a Lockett claim challenging the correctness of instruction S. 3-A. That particular question, however, was neither raised nor decided on direct appeal.[3/] Our Court addressed the denial of D-2, not the integrity of S. 3-A. Consequently, petitioner has failed to invoke the jurisdiction of this Court with respect to any Eighth and Fourteenth Amendment claim.

[2] Opinion Below Accurate and Correct.

In addition, the Supreme Court of Mississippi correctly decided, on the basis of existing state law, the narrow issue presented by Hill on direct appeal. Hill argued in his brief that "[i]f the jury did not find any aggravating circumstances, then surely the fact that no mitigating circumstances exist does not mean the jury cannot sentence the Appellant to life imprisonment." Our Court confronted this claim by observing that, contrary to a jury finding of no aggravating factors, the jury found the existence of four (4) circumstances in aggravation and

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3/ Hill was tried on November 17-21, 1980, well over two (2) years after this Court decided Lockett. On direct appeal Hill relied upon Gregg v. Georgia [citation omitted], not Lockett.

wrote into its verdict that such not only outweighed the mitigating circumstances proffered for consideration but were ". . . sufficient to impose the death penalty." [emphasis ours]

Jury instruction S. 3-A, which was not assailed or challenged in the state appellate court, granted to the sentencer the prerogative of returning one of three possible verdicts, viz., a unanimous finding that the aggravating circumstances ". . . outweigh the mitigating circumstances and are sufficient to impose the death penalty. . ."; a finding ". . . that the Defendant should be sentenced to life imprisonment"; and "[t]he Jury has been unable to agree unanimously on punishment." (Petitioner's Appendix A at p. 71) [emphasis ours] A reasonable juror would have been aware that he could find that any aggravating circumstances were not particularly weighty and were, therefore, insufficient to warrant the death penalty even in the absence of any mitigating circumstances.

[3] Inconsequential Question Lacking National Importance.

Finally, the question raised by petitioner is important only to his case and is without any impact whatever outside the limits thereof. Assuming this Court has jurisdiction to review the totality of the sentencing phase instructions, all that is involved is application of the principles contained in Sandstrom v. Montana, Henderson v. Kibbe, and Cupp v. Naughten, supra, to a particular jury instruction (S. 3-A, unique to Hill's case. Accordingly, the issue is too narrow and not sufficiently important to warrant this Court's attention on certiorari. Stated differently, the issue is of such minor importance in the overall structure of the law that resolution by the Supreme Court is unnecessary at this time.

III.

CERTIORARI SHOULD BE DENIED BECAUSE [1] PETITIONER FAILED ON DIRECT APPEAL TO COUCH HIS CLAIM IN FEDERAL CONSTITUTIONAL TERMS; [2] THE ONLY REAL QUESTION RAISED BY HILL WITH RESPECT TO THE ADMISSIBILITY OF PHOTOGRAPHS TURNS ON THE PARTICULAR FACTS OF HIS CASE ALONE AND FAILS TO IMPACT OUTSIDE THE LIMITS OF THE INSTANT PROCEEDINGS; AND [3] THE OPINION OF THE STATE COURT IS BOTH ACCURATE AND CORRECT.

[1] Jurisdictional Defects.

Petitioner contends the admission, at both the guilt-finding and sentence-determining phase of his bifurcated trial, of seven (7) black and white photographs depicting the victim's skeletal remains violated the Sixth, Eighth and Fourteenth Amendments.

As to petitioner's contention that the photographs were erroneously admitted during the sentencing stage of the two-stage trial, this claim was neither pursued on direct appeal nor addressed by the Supreme Court of Mississippi. The entire content of Hill's argument advanced in his brief-on-the-merits filed in State court is quoted as follows:

> PROPOSITION IV: THAT THE TRIAL COURT ERRED IN ALLOWING INTO EVIDENCE, OVER APPELLANT"S OBJECTION, SEVEN (7) PHOTOGRAPHS, DEPICTING THE BODY OF THE DECEASED, ROBERT WATKINS.
>
> During the direct examination of State's witness, Tom Long, the State, over renewed objection, introduced seven (7) photographs (S-7) of the decomposed body of the deceased victim, Robert Watkins. (A. 4) (R. 718) The trial judge had previously heard Appellant's objection in chambers and had overruled same. (A. 4) (R. 716-718) The Appellant contends that such a ruling and the subsequent introduction of the photographs constitutes reversible error for the reason that same had no probative value since the death of the deceased was not disputed. The Appellant further contends that the introduction of the photographs was done to inflame the minds of the jurors.
>
> In Williams v. State, 354 So.2d 266 (Miss. 1978) this Court clearly stated that the introduction of similar photographs to

> those in the case at bar was erroneous. The Appellant submits that in this capital murder case, such action constitutes reversible error rather than harmless error. Irving v. State, 361 So.2d 1360 (Miss. 1970).
>
> Appellant's State Court Brief at p. 11.

Under the rationale of Webb v. Webb, 451 U.S. 493 (1981), and Cardinale v. Louisiana, 394 U.S. 437 (1969), the Supreme Court of the United States lacks jurisdiction to decide an issue that has never been presented to the state courts or was not presented in a federal constitutional context to the state courts.

This reasoning, clearly applicable to the sentencing stage, is equally applicable to introduction of the photographs at the guilt-finding phase. It is obvious from petitioner's brief filed in state court that he failed to implicate —— indeed, he did not even mention —— the Sixth, Eighth or Fourteenth Amendments. Rather, his argument was premised solely on state substantive law. Accordingly, certiorari should be denied for this reason if for no other.

[2] Lack of National Importance; Invitation to Fact Canvassing; Lack of Substantial Federal Question.

Petitioner invites this Court to exercise its discretion in favor of plenary review of an evidentiary ruling turning solely upon the state trial court's discretionary prerogative. Whether or not the photographs had probative value, both at the guilt and sentencing stages of Hill's bifurcated trial, hinges on the particular facts of this case alone and is of interest only to Hill. Accordingly, this issue lacks overall, national importance and is not cert-worthy for this reason.

In effect, petitioner invites this Court to conduct a third review of the seven photographs, together with a third review of the record facts, to see if it can find what two previous courts have been unable to find —— a dearth of probative value. The

trial judge found that the pictures possessed legitimate evidentiary value, both at the guilt and sentencing phase. The Supreme Court of Mississippi, on direct appeal, penned this rhetoric in the wake of a challenge to the trial court's discretionary assessment:

> The admission of photographs of the remains of Watkins was within the discretion of the circuit judge, and having probative value, no error was committed in offering them into evidence. See Tubbs v. State, 402 So.2d 830 (Miss. 1981); Davis v. State, 376 So.2d 1079 (Miss. 1979); Voyles v. State, 362 So.2d 1236 (Miss. 1978), cert. denied, 441 U.S. 956, 99 S.Ct. 2184, 60 L.Ed.2d 1059 (1979); Irving v. State, supra; Brown v. State, 235 So.2d 458 (Miss. 1979); Stokes v. State, 240 Miss. 453, 128 So.2d 341 (1961); and Price v. State, Miss., 54 So.2d 667, 669 (1951).
>
> Petitioner's Appendix A at p. 18.

Within the realm of factual review and analysis,the rulings of the courts below are treated with and entitled to great weight. This is especially true where the correctness of an evidentiary ruling proffered as a candidate for review turns not upon an application of positive constitutional law or fixed rules but rests in the trial court's discretion.

Judicial discretion, in our view, involves an idea of choice, of an exercise of the will, and of a determination made between competing considerations. In order to have an "abuse" of that discretion, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, and not the exercise of reason but rather of passion and bias. Review via certiorari of these considerations is not particularly compelling since they fail, in our opinion, to substantially implicate any Sixth, Eighth, or Fourteenth Amendment rights.

Moreover, an acceptance of petitioner's invitation for plenary review would require fact canvassing of an eight(8)

volume, 1343 page trial record. This Court has ruled that such fact canvassing is not a task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnson, 268 U.S. 220, 227 (1925).

In the present cause, Hill's challenge turns entirely upon the facts of his case, already twice resolved in state court in favor of respondents, and devoid of any impact whatever outside the limits of the instant proceedings.

[3] Opinion Below Accurate and Correct.

Finally, the Supreme Court of Mississippi gave full consideration to the matter as presented on direct appeal, and the opinion penned below is both accurate and correct under state law. At the guilt phase, the photographs were probative with respect to the question of identity. See Wilson v. United States, 162 U.S. 613 (1896). Although identification was achieved largely with the aid of the victim's dental records, the photographs criticized here adequately explained to the factfinder the reason it was necessary for the State to rely upon expert identification. Dr. Galvez, the State's pathologist, testified that the cranial trauma disclosed by his post-mortem examination ". . . was a classic example of a projectile entering through the back of the head and coming out in the front of the head." Four (4) of the seven (7) photographs portray pictorially the doctor's "classic example." Moreover, the testimony of Dr. Galvez, by his own admission, did not dip into the "single details" of the wound inflicted. The photographs were admissible to fill this void.

Under Mississippi law the photographs were also admissible, within the trial court's sound discretion, to show the corpse in a homicide prosecution. Ladner v. State, 197 So.2d 257 (Miss. 1967). They were, likewise, admissible to show the condition of

the victim [(See Price v. State, 54 So.2d 667 (Miss. 1951)], and the exact location of the gunshot wound. See Davis v. State, 376 So.2d 1079 (Miss. 1979); Cochran v. State, 244 So.2d 22 (Miss. 1971); Jones v. State, 228 Miss. 296, 87 So.2d 573 (1956). They were admissible to prove robbery as the underlying felony since one of the photographs depicts the victim's billfold laying on the ground next to the skeletal remains.

Photostatic copies of the seven (7) photographs are attached to this response. The pictures of the denuded bones are neither inordinately gruesome nor inflammatory. See Jones v. State, 367 So.2d 458 (Miss. 1979). Assuming otherwise, under Mississippi law the fact that pictures of a homicide might arouse the emotions of the jurors does not of itself render them incompetent so long as they serve a legitimate evidentiary purpose. Butler v. State, 320 So.2d 786 (Miss. 1975).

Moreover, in Hill's case the identification testimony elicited from the State's experts flowed in the wake of the photographic proffer. By viewing the photographs of the victim as he was found and observed at the crime scene, the jury was in a better position to understand the testimony of the State's pathologists who gleaned a great deal of information from the skeletal remains. In short, the photographs had legitimate evidentiary value.

For these reasons, the third question advanced by petitioner is not worthy of certiorari.

VII. CONCLUSION

The petitioner's contentions pose no question of particular moment or indecision in the case law of the land, and it is therefore respectfully submitted that the petition for writ of certiorari in all justice should be denied.

Respectfully submitted,

BILL ALLAIN

Attorney General

Catherine Walker Underwood

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(Counsel of Record)

Assistant Attorney General

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Attorneys for Respondent

Of Counsel

Billy L. Gore

Assistant Attorney General

CERTIFICATE

I, Billy L. Gore, Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Petition For A Writ Of Certiorari To The Supreme Court Of Mississippi to Honorable Steven L. Winter, Suite 2030, 10 Columbus Circle, New York, New York 10019.

This, the 14th day of September, A.D., 1983.

Billy L. Gore

ASSISTANT ATTORNEY GENERAL

EXHIBIT A

EXHIBIT S-7(G) FOR State

WITNESS Tom Long

FILED June Nov. 18, 80

CAUSE NUMBER 3427

CIRCUIT COURT OF DeSoto

_____ JUDICIAL DISTRICT

Direct EXAMINATION

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& FILED

MAR 4 1982

Robert E. Norrack
Supreme Court Clerk

S-7

EXHIBIT B

53,995

EXHIBIT S-7(e) FOR State

WITNESS Tom Long

FILED Tue Nov. 18, 80

CAUSE NUMBER 3427

CIRCUIT COURT OF DeSoto

_____ JUDICIAL DISTRICT

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Supreme Court Clerk

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EXHIBIT C

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Supreme Court Clerk

EXHIBIT S-7(d) FOR State

WITNESS Tom Long

FILED Jue nov. 18, 82

CAUSE NUMBER 3427

CIRCUIT COURT OF DeSoto

_____ JUDICIAL DISTRICT

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EXHIBIT D

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EXHIBIT S-7(b) FOR State
WITNESS Tom Long
FILED Tue Nov. 18, 80
CAUSE NUMBER 3627
CIRCUIT COURT OF DeSoto
JUDICIAL DISTRICT
Direct EXAMINATION

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EXHIBIT E

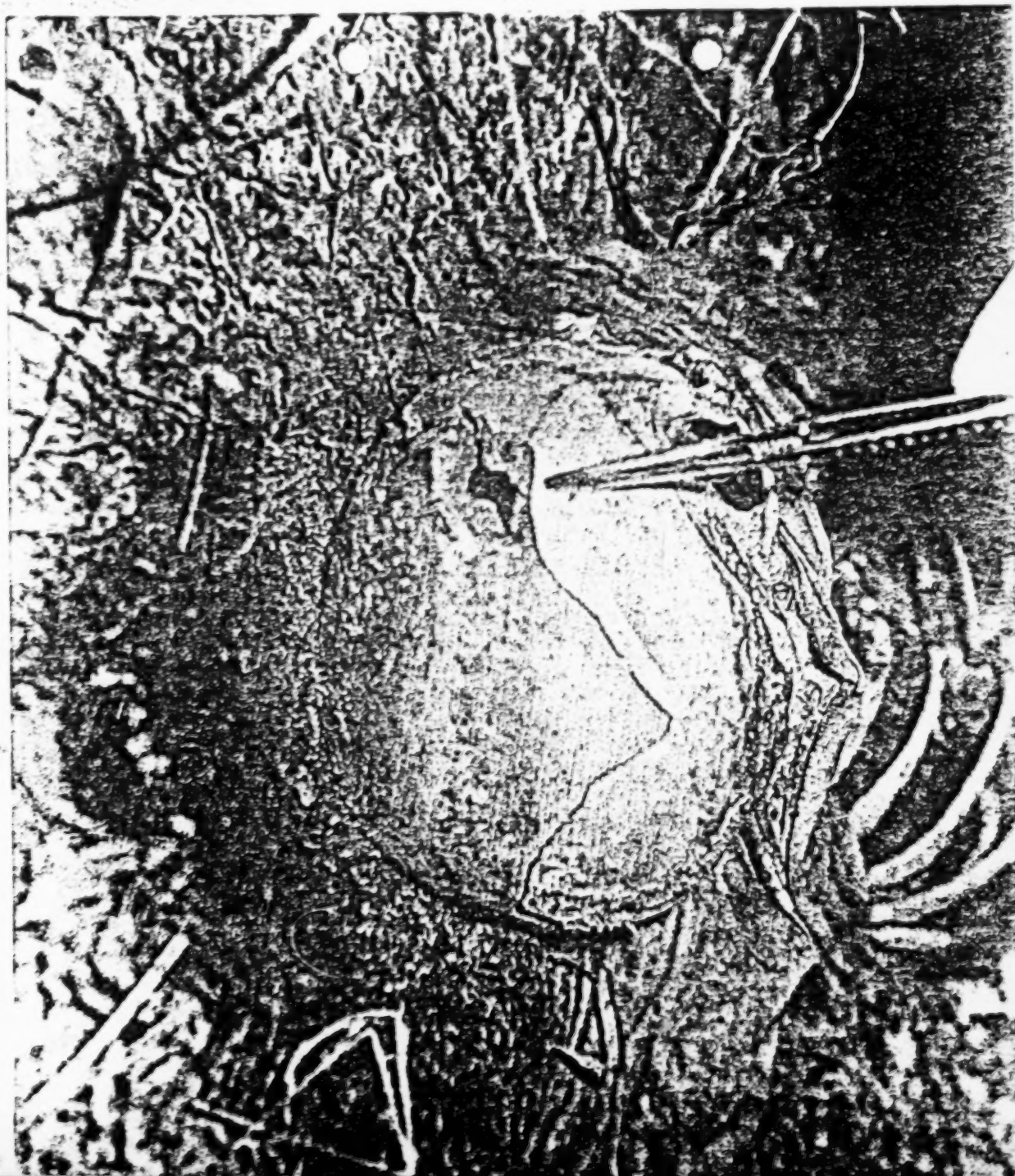

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EXHIBIT S-7(c) FOR State

WITNESS Tom Long

FILED Jan 28-18,80

CAUSE NUMBER 3427

CIRCUIT COURT OF DeSoto

_____ JUDICIAL DISTRICT

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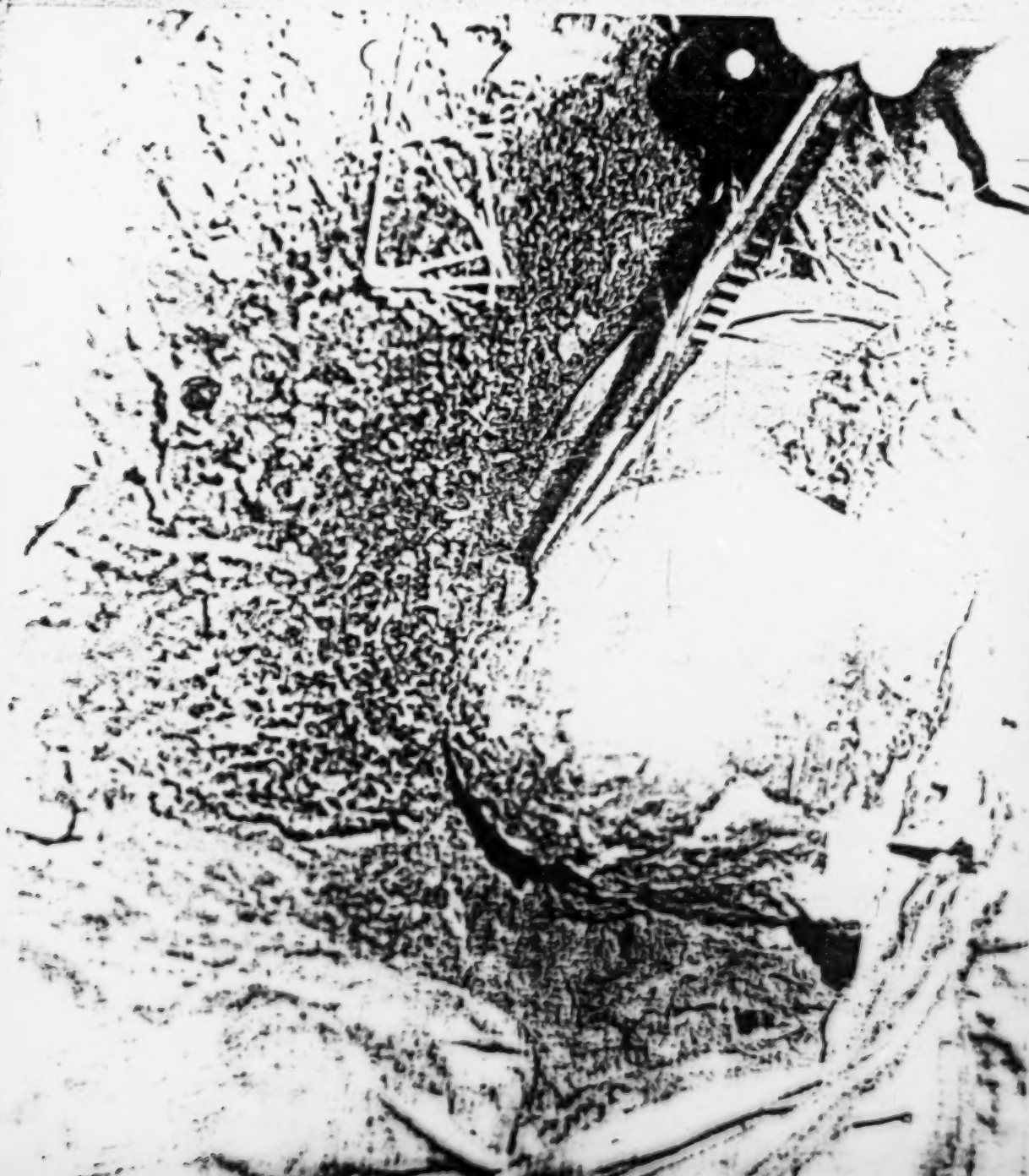
EXHIBIT P



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WITNESS Tom Long

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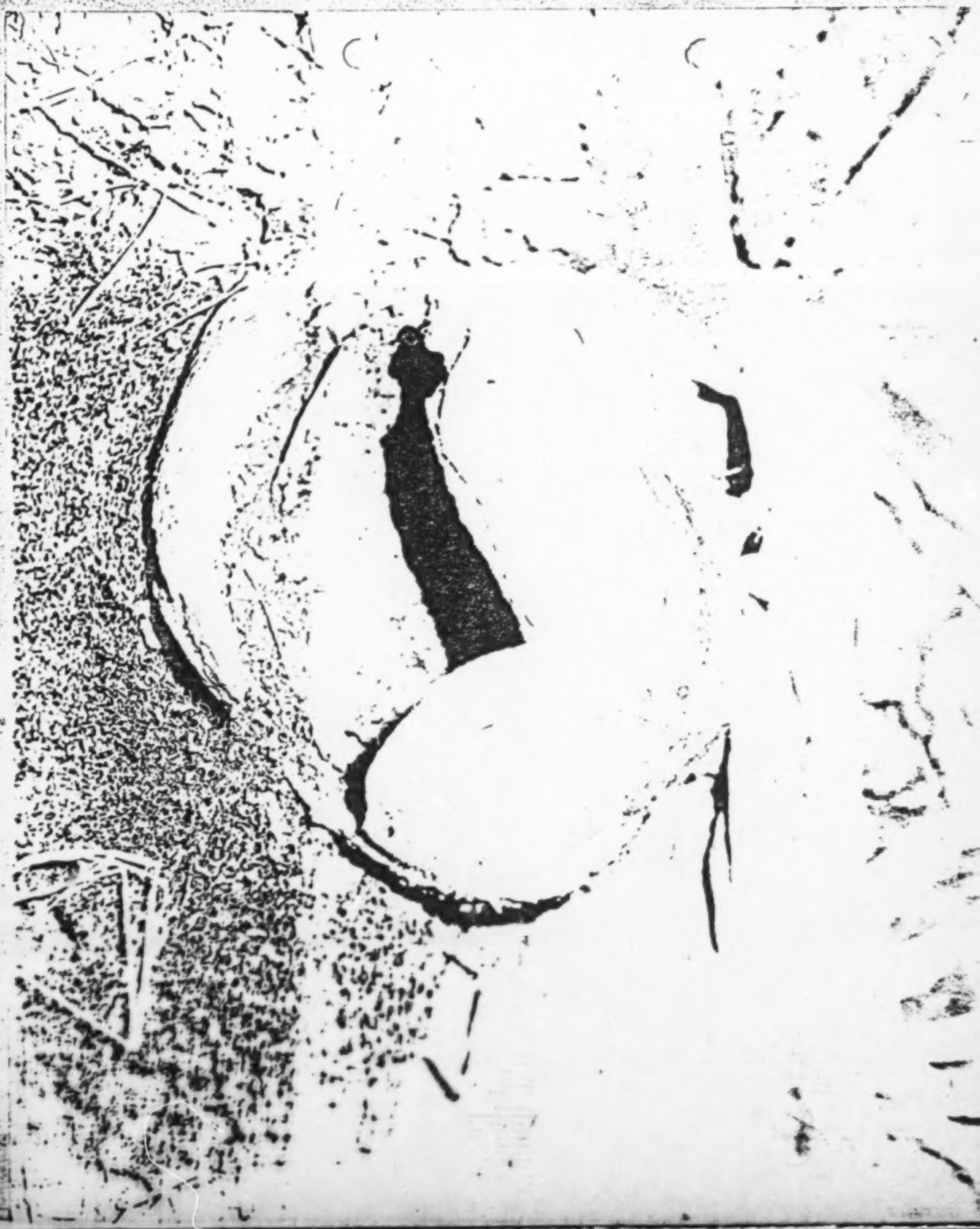
EXHIBIT G



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Supreme Court Clerk

EXHIBIT S-7(F) FOR State

WITNESS Tom Long

FILED June 28th-18,80

CAUSE NUMBER 3427

CIRCUIT COURT OF DeSoto

_____ JUDICIAL DISTRICT

Direct EXAMINATION

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